IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-90

JOHN SCHILB, et al.,

Plaintiffs-Appellants,

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

Appeal from the Supreme Court of the State of Illinois

PETITION FOR REHEARING

Plaintiffs respectfully petition this honorable Court to grant a rehearing of this cause, in which the opinion rendered on December 20, 1971, affirmed the opinion of the Supreme Court of the State of Illinois. As grounds for such petition, plaintiffs respectfully submit that the Court in its opinion has overlooked or misapprehended certain factual, procedural, and substantive principles.

I.

A DECISION IN FAVOR OF THE PLAINTIFFS WILL NOT RESULT IN THE RETURN OF THE BONDSMAN SYSTEM.

The sole contention of plaintiffs in this case is that the provision of the Illinois Bail Act which provides for the retention by the clerk of an amount equal to 1% (Section 110-7(f)) of the total amount of the bond is an arbitrary and unreasonable discrimination against some of the people who secure their liberty pending trial under the provisions of the Act. In an apparent effort to overcome discrimination by the statute, defendants contended in this Court for the first time that if plaintiffs' position were sustained the entire Illinois Bail Act would fall and the evils of professional bondsmen would return. That is neither the fact nor the law.

In the State of Illinois only the provision which is held to be unconstitutional will fall, and the rest and remainder of the statute remains in full force and effect. *Livingston* v. *Ogilvie,* 43 Ill. 2d 9; *Hornof* v. *Kroger Co.,* 35 Ill. 2d 125; *People ex rel. Holland Coal Co.* v. *Isaacs,* 22 Ill. 2d 477.

The cost provision of Section 110-7(f) is separable, and the salutary provisions of the Illinois Bail Act [Ill. Rev. Stat. 1963, Ch. 38, Pars. 110-1 et seq.] will remain in full force and effect.

II.

FUNDAMENTAL RIGHTS OF THE PLAINTIFFS ARE INVOLVED FOR THE SALIENT ISSUE IS THE LIBERTY OF AN INDIGENT WHO DOES NOT HAVE FUNDS EQUAL TO AT LEAST ONE PERCENT OF THE AMOUNT OF BAIL FIXED.

The majority opinion rightfully recognized that "Our concern . . . is with the 1% cost retention provision".

Regretably however the majority thought:

> "This smacks of administrative detail and of procedure and is hardly to be classified as a 'fundamental' right or as based upon any suspect criteria." (Op. 8)

The real fact of the matter, however, is that the cost retention provision directly affects the ability of the poorest of our citizens to utilize the benefits of the Illinois Bail Bond Act. Thus this provision is "fundamental" to the liberty of probably the most deserving group of persons under the Act. This is true because if one is accused of a crime and bond is set at $10,000, not having any assets he is required to remain incarcerated prior to trial if he cannot borrow the $1,000 necessary for the ten percent deposit under Section 110-7. But who is going to lend it to him, if all he can guarantee is a return of $900? Accordingly, the issue is his liberty—not "administrative detail and procedure" (Op. 8). In addition to his loss of liberty, his imprisonment pending trial materially affects his preparation of his defense; his ability to earn money to hire counsel and support his family; the ultimate outcome of the trial; and imposes costs on the public [Attorney General's Committee on Poverty and

the Administration of Criminal Justice Procedure Report (U. S. Cong. and Admin. Ntws 1966 p. 2299)]. The real "compelling public interest" therefore is liberty pending trial.

There is nothing of record to show that the distinction created by the imposition of the cost on those gaining release under Section 110-7, as opposed to those gaining release on their own recognizance under Section 110-2 or full deposit of bail under Section 110-8, rests upon a rational basis. At no time prior to the passage of Section 110-7(f) were any administrative costs of the office of the Clerk imposed upon anyone gaining pretrial release. By the enactment of Section 110-7(f) a new concept of cost recoupment was instituted in the State of Illinois; and the disparity condemned in *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966) was created—a disparity which had "no relevance to the purpose for which the classification was made" [384 U.S. 309; see also *Reed* v. *Reed*, 92 S. Ct. 251 (1971)].

Recoupment of administrative costs of making bail of *some* provided by Section 110-7(f) cannot be equated to the fees formerly charged by a bondsman. The bondsman assumed a risk of liability if the terms of bail were violated. The Clerk has never assumed liability, but was then and is now merely a stakeholder. The administrative cost borne by that group of poor who comply with the terms of their bond, whether they are adjudged innocent or guilty, is simply not justified under any concept of equal protection. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Mayer* v. *City of Chicago*, 40 L. Week 4055 (Dec. 13, 1971).

While it is true that the majority of the Court cite the *Rinaldi* and *Griffin* doctrines with approval, and thus

appear to prescribe to those concepts of equal protection, the refusal to apply those principles in the instant case is tantamount to overruling those decisions *sub silentio,* adding confusion to an area of constitutional law of tremendous importanee to all the people, but to the poor in particular, not only in Illinois but also in all of the States of the United States.

It is no answer to the charge of discrimination to say plaintiffs are better off being charged 1% rather than 10%. At no time in the history of the administration of Illinois bail was that 1% ever imposed for administration bail cost. It was a new concept, a new cost which was created by Section 110-7. Can this administrative cost justifiably be imposed on only those released under 110-7 when work is done for all. Remember the 10% bondsman fee were charged only on those who utilized his service. If the decision of this Court is unchanged, what today is 1%, tomorrow may be 5%, and the day after may be 10%.

In addition, the failure to recognize the importance of the refusal of Congress to impose the one percent burden of those released on 10% of deposit is apparently based upon the misconception that there were no federal bail bondsmen. This is not the fact. The Federal Bail Reform Act, like its Illinois counterpart, was intended to reduce the cost of making bonds to persons awaiting trial.

III.

FACTUAL MISCONCEPTIONS.

Distinguishing those released under Section 110-8 and those released under Section 110-7 of the Illinois Criminal Code, the Court stated "one who deposits securities

or encumbers his real estate precludes the use of that property for other purposes'' (Op. 13). In practice the affluent (those with a true choice and means—Committee Comments, Chap. 38, par. 110-1) and those with business acumen would utilize Section 110-8 rather than deposit 10% of full bail in cash under Section 110-7. Securities, bonds, stocks and real estate are deposited in *specie* or subject to a lien. Said depositors are not deprived of the income earned by said securities, etc., nor the use of the real estate. These depositors, not the State, are the recipients of any interest, dividends or rents produced.

To illustrate we submit the following hypothetical situation. If "A'' is accused of a crime and bond is set at $10,000, having sufficient assets he deposits a United States Treasury Bill in the face value of $10,000 under Section 110-8. One year after deposit he is found guilty as charged. The $10,000 Treasury Bill is returned to him; no bail costs are imposed upon him by the Clerk and he has earned $600 interest.

Conversely, "B" is charged with the same crime and bond is likewise set at $10,000. Not having sufficient assets he is forced to borrow $1,000 from a small loan company, and obtains release under Section 110-7. One year after said deposit he is found not guilty and released. The Clerk of the Court charges him $100 as bail cost under Section 110-7(f). "B" is further obligated to repay the $1,000 he borrowed plus interest of $180 for exercising his constitutional right to remain free prior to trial.

The affluent have a choice ,a choice which can definitely be traced to and predicated upon economic factors, and we submit that the statistics provided by the defendant (Aple. Br. App. B) prove that there are those with sufficient property who utilize Section 110-8 for their

economic advantage and to the detriment of those without such assets. It is those without such assets upon whom the full burden of supporting the administration of the bail system falls.

The Court has suggested that for the non-affluent and the indigent the system can best be served upon their release upon their own recognizance under Section 110-2. In this we agree fully. However, it is an unrealistic solution for it is the poor, transient, felons, homeless, deprived and unstable who are clearly not the recipients of release upon their personal recognizance as evidenced by the criteria set forth in Section 110-5.

These are such apparent facts that an editorial appeared in the Chicago Daily News (Appendix A) relative to this cause, which stated:

> "Though the tribunal's majority held that no evidence was presented to show that recognizance bonds were granted more often for the well-to-do than the poor, the fact is that such discrimination does exist."

Further, we submit that as the release on recognizance is expanded within the State of Illinois, or any other jurisdiction, it will be extended to those who have roots in the community—not to those less fortunate, and as the editorial continues:

> "As a matter of equity, the Legislature should amend the law to prohibit the collection of the 10% administrative fee by the Courts. This discriminatory provision will become even less tolerable as the use of recognizance bonds becomes more wide spread."

We submit that this is inevitable. As release upon recognizance is expanded, the cost burden will fall more heavily upon the non-affluent and the less fortunate segment of our society. Since the majority has approved a

statutory discrimination, without regard to degree, there might be an effort to increase the rate to meet administrative costs not contributed to by other persons, not only in Illinois but in all jurisdictions.

This reimbursement of the costs has nothing to do with forfeitures. Upon default the deposits are immediately collected and mandatory judgments are entered for the full amount.

It is significant that other States (Iowa and Alaska) have similar systems which are functioning without such imposition of costs as is that of the Federal Government. The savings to the taxpayer for the costs of the incarceration has more than reimbursed the governmental units for any increase in costs of administration. It thus appears that the "compelling public interest" is in the elimination of this discriminatory impediment to liberty of all persons pending trial.

CONCLUSION

The plaintiffs-appellants respectfully pray that this Honorable Court grant this petition for rehearing.

Respectfully submitted,

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APPENDIX A

CHICAGO DAILY NEWS

An Independent Newspaper Founded January 1, 1876

Marshall Field, Publisher

* * *

Tuesday, December 28, 1971

More bail reform needed

Though we welcome the U.S. Supreme Court's approval of Illinois' bail bond reform law, we believe the case that tested it brought out a flaw that should be corrected.

The reform act, adopted in 1963, is essentially sound and fair. As Justice Harry Blackmun said for the four-man court majority. it brought "needed relief" from the professional bailbondsman system that was "in full and odorous bloom" before its enactment. The law permits a defendant to be freed on posting of only 10 per cent of the total bond.

The challenge against the law's constitutionality centered on the provision permitting the courts to keep 10 per cent of the defendant's payment, whether he was found innocent or guilty. The suit contended this unfairly levied a court cost against the innocent and discriminated against poor defendants since no costs are imposed on wealthier defendants who are freed on their own personal recognizance. Though the tribunal's majority held that no evidence was presented to show that recognition bonds were granted more often for the well-to-do than for the poor, the fact is that such discrimination does exist.

But the question of a defendant's solvency has no bearing on establishing that the law still discriminates between defendants—poor or rich— who are released on their own recognizance and those who are required to post cash bonds. Justice Potter Stewart, speaking for the three-man minority, rightly concluded that since administrative costs are not levied against people released on recognizance, the law violates the Constitution's equal protection clause.

The court's close division on this issue crossed customary lines, with two liberals and one other conservative siding with Blackmun, and two liberals joining the conservative Stewart. If there were a rehearing on the case when the two new justices are seated on the court, the decision conceivably could swing the other way.

As a matter of equity, the Legislature should amend the law to prohibit the collection of the 10-per cent administrative fee by the courts. This discriminatory provision will become even less tolerable as the use of recognizance bonds becomes more widespread.